

To the Honorable Council City of Norfolk, Virginia May 10, 2016

From:

David S. Freeman, AICP

Director of General Services

Subject: Encroachment Agreement with Paul Filion for Outdoor Dining at

114 E. 25th Street

Reviewed: (

Sabrina Joy-Hogg, Deputy City Manager

Ward/Superward: 2/6

Approved:

1.

Marcus D. Jones, City Manager

Item Number:

R-17

Recommendation: Adopt Ordinance

II. Applicant:

Paul Filion

114 E. 25th St.

Norfolk, VA

III. Description:

This agenda item is an ordinance to permit the applicant, Paul Filion, to encroach into the City of Norfolk's (the "city's") right-of-way at 114 E. 25th Street with an area measuring approximately 155 square feet for use as an outdoor dining area and for no other purpose.

IV. Analysis

This encroachment will permit Paul Filion and his tenant, Rip Rap Brewery, to utilize this area for outdoor dining in addition to indoor seating. The term of the encroachment is no longer than five (5) years, commencing on May 1, 2016, or the date of any authorizing ordinance, and terminating on April 30, 2021. The permission granted for this encroachment is subject to the right of revocation by the Norfolk City Council.

V. Financial Impact

mancial impact	
Encroachment Fee (Paul Filion)	Annual Rent: \$930 (to be paid monthly: \$77.50 per month)
Liability insurance for Paul Filion (to be provided by the tenant)	The City has been named as an additional insured in the amount of \$1,000,000 per occurrence; therefore, there should be no financial risk to the City

VI. Environmental

There are no known environmental issues associated with this property.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the city's agenda notification process.

VIII. Board/Commission Action

N/A

IX. Coordination/Outreach

This letter and ordinance have been coordinated with the Department of General Services – Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Proposed Encroachment Agreement
- Outdoor Dining Layout
- · Pictures of Exterior

3/14/2016 - wld

Form and Correctness Approved

Office of the City Attorney

NORFOLK, VIRGINIA

Contents Approved:

DEPT. General Services

ORDINANCE No.

AN ORDINANCE GRANTING PAUL FILION PERMISSION TO ENCROACH INTO THE RIGHT OF WAY AT 114 E. 25th STREET APPROXIMATELY 155 SQUARE FEET FOR THE PURPOSE OF OUTDOOR DINING AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and conditions of the Encroachment Agreement between the City of Norfolk and Paul Filion ("Filion"), a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to Filion to encroach into the right of way at 114 E. 25th Street approximately 155 square feet for the purpose of outdoor dining and for no other purpose.

Section 2:- That the City Manager and other proper officers of the City are hereby authorized to execute the Encroachment Agreement and do all things necessary for its implementation.

Section 3:- That the City Manager is further authorized to correct, amend or revise the Encroachment Agreement as he may deem advisable consistent with the intent of the Council as expressed therein.

Section 4:- That this ordinance shall be in effect from and after its adoption.



ENCROACHMENT AGREEMENT

This ENCROACHMENT AGREEMENT ("Agreement") is made and entered into this ____ day of ______, 2016, by and between the CITY OF NORFOLK, VIRGINIA, a municipal corporation of the Commonwealth of Virginia ("City"), and PAUL FILION, an individual ("Filion"), whose address is 611 Vanderbilt Avenue, Virginia Beach, Virginia 23451.

WITNESSETH:

- 1. **ENCROACHMENT AREA:** City hereby grants permission to Filion to encroach into the right of way at 114 E. 25th Street approximately 155 +/- square feet, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor dining and for no other purpose.
- 2. <u>USE:</u> Filion, and his tenant(s), shall be permitted to occupy the Encroachment Area for outdoor dining purposes in conjunction with the operation of a dining establishment.
- 3. **TERM; TERMINATION:** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on May 1, 2016, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on the last day of April, 2021. However, it is expressly understood that the permission granted herein is subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Filion, and his tenant(s), if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.
- 4. <u>COMPENSATION:</u> As compensation for the privilege of encroaching into the right of way, Filion shall pay City an annual encroachment fee in the amount of **Nine Hundred Thirty and 0/100 Dollars (\$930.00)**, payable in monthly installments of **Seventy-seven and 50/100 Dollars (\$77.50)**, beginning on the first day of May, 2016, or the day the ordinance is effective, whichever is later. The encroachment fee shall be paid by check payable to the "Norfolk"

City Treasurer" and sent to the Department of General Services, 232 E. Main Street, Suite 250, Norfolk, VA 23510, and Attn: Mr. Jim Resolute.

- 5. **LATE FEES:** For any late payments received 5 days after the first of each month, Filion shall pay a late fee of five percent (5%) of the amount not paid when due.
- 6. <u>UTILITIES:</u> City shall not be responsible for utilities of any type used within the Encroachment Area. Filion shall pay all utility meter and utility services charges for all utilities, including but not limited to, gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.
- Area in good and complete state of repair and condition. Filion, and his tenant(s) shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and competent manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.
- 8. **REQUIREMENTS OF PUBLIC LAWS:** Filion, and his tenant(s), shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state, and municipal laws, ordinances and regulations applicable to the structure, use, and occupancy of the Encroachment Area. In addition, Filion, and his tenants(s), shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.
- 9. **RIGHT TO ENTER AND CURE:** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs, which City deems necessary because of

any failure of Filion, or his tenant(s), to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area for cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Filion's, and/or his tenant(s), default in making repairs.

10. NOTICE: Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City:

Department of General Services

Attn: Mr. Jim Resolute

232 E. Main Street, Suite 250 Norfolk, Virginia 23510

Filion:

Paul Filion

611 Vanderbilt Avenue

Virginia Beach, Virginia 23451

With copies to:

City Attorney

900 City Hall Building

810 Union Street

Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS:** Filion, and his tenant(s), agree that they will not introduce onto the Encroachment Area any toxic, hazardous, or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Filion, and his tenant(s), will not allow any air, water, or noise pollution to occur in the Encroachment Area. Filion, and his tenant(s), hereby agree to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Filion, and his tenant(s), shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to occupancy by Filion thereof.

- 12. **<u>DESTRUCTION:</u>** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.
- which may be sustained by Filion, his tenant(s), or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, hearing or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Filion, his tenant(s), or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.
- 14. **REMOVAL OF SNOW:** Filion, and his tenant(s), agree to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.
- make any improvements, changes, installations, renovations, additions, or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee and Norfolk's Planning Commission. If Filion, and/or his tenants, install or make any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Filion, and his tenant(s), hereby agree to remove, if requested by City, any improvements, additions, installations, and renovations, changes on or to

the Encroachment Area upon termination of this Agreement. In the event Filion, and/or his tenant(s), fail to remove the improvements, additions, installations, renovations, and changes on or to the Encroachment Area when requested to do so by City, then the City may remove the improvements, additions, installations, renovations, changes and Filion, and his tenant(s), shall be jointly and severally liable for paying for the cost of such removal.

- 16. **ASSIGNMENT AND SUBLETTING:** City and Filion agree that the permission to encroach granted hereby is for the benefit of Filion and his tenant(s), and may not be assigned by Filion without written approval from Norfolk's City Manager. Further, upon Filion's lease of the premises (adjoining the Encroachment Area) to a tenant, Filion shall have any such tenant execute a copy of this Agreement, acknowledging acceptance of the terms and conditions set forth herein.
- Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Filion, and his tenant(s), shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Filion's use of the Encroachment Area. If Filion, and his tenant(s), have been requested to remove and fail to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Filion, and his tenant(s), shall be jointly and severally liable to City for the cost of any removal and disposal.
- 18. **INSURANCE:** Filion, and his tenant(s), shall maintain in full force and effect Commercial General Liability ("CGL") insurance with a combined single limit policy of bodily injury, death and property damage insurance of One Million and 0/100 Dollars (\$1,000,000) per occurrence and Two Million and 0/100 Dollars (\$2,000,000) general aggregate insuring against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and

appurtenant areas. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury, and liability assumed under insured contract. The City, its officers, employees, agents and representatives shall be named as additional insured on any such policy. Coverage shall be evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the City, as the additional insured, if the insurance is cancelled or modified. Filion, and his tenant(s), shall inform the City Attorney and the Department of General Services within 15 days of receiving such notice or cancellation, and immediately obtain coverage compliant with this agreement.

Filion, and his tenant(s), shall maintain the applicable statutory Workers' Compensation Insurance, and Employer's Liability Insurance with a limit of at least \$500,000 per accident/disease, and policy limit of \$500,000 covering any of Filion's employees, and his tenant's employees, whose work occurs within the premises which are subject to this agreement.

harmless City from all fines, penalties, costs, suits, proceedings, liabilities, damages, claims and actions of any kind arising out of the use and occupation of the Premises by reason of any breach or nonperformance of any covenant or condition of this Agreement by Filion, or his tenant(s), or by Filion's, or his tenant(s)', intentional act or negligence, and not caused in whole or in part by City. This indemnification shall extend to all claims of any person or party for death or injury to persons and damage to any property, and to legal expenses, including reasonable attorney's fees, incurred by City in the defense of such claims or incurred by City as a result of a breach of any provision of this Agreement by Filion, or his tenant(s), but does not extend to circumstances caused in whole or in part by City.

20. **FIXTURES:** City covenants and agrees that no part of the improvements constructed, erected or placed by Filion, or his tenant(s), in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City, Filion, and his tenant(s), to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Filion, and/or its tenant(s), in the Encroachment Area shall be and remain the property of Filion, and/or his tenant(s), unless such improvements are not removed upon termination of this Agreement.

21. ENVIRONMENTAL:

- (a) For purposes of this section:
- (i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. § 6901 et seq.) (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.
- (ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing, or dumping.
- (iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the

Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of Filion, and/or his tenant(s), including but not limited to Filion's, or his tenant(s)', interest in the Encroachment Area, the adjoining real property, or any of Filion's, and/or his tenant(s)', personal property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

- (b) To the extent that Filion, and his tenant(s), may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Filion, and his tenant(s), shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Filion, and his tenant(s), shall not cause or permit, because of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Filion, or his tenant(s), shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.
- (c) Filion, and his tenant(s), shall comply with all applicable federal, state, and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with all permits required thereunder, any successor, or new environmental laws. Upon the receipt of any Notice, Filion, and his tenant(s), shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

- (d) The requirements of this Section 21 shall apply to any successor in interest to Filion, and his tenant(s), whether due to merger, sale of assets or other business combination or change of control.
- (e) Filion, and his tenant(s), hereby agree to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Filion's, and/or his tenant(s), failure to comply strictly with the provisions of this Section 21. The provisions of this Section 21 shall survive the termination of this permission granted by this Agreement.
- 22. <u>LIENS OR ENCUMBRANCES:</u> If because of any act or omission of Filion, and/or his tenant(s), any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Filion, and his tenant(s), shall, at their own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Filion, and/or his tenant(s), of the filing thereof, and Filion, and/or his tenant(s), shall have the right to contest the validity of such lien if they so choose.
- 23. **APPLICABLE LAW:** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.
- 24. **WAIVER OF TRIAL BY JURY:** To the extent permitted by law, City and Filion, and his tenant(s), mutually waive their right to trial by jury in any action, proceeding, or

counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Filion, and his tenant(s), by this agreement.

25. OTHER REQUIREMENTS:

- (a) Filion, and his tenant(s), shall comply with the City of Norfolk's DowntownOutdoor Dining Policy.
- (b) Filion, and his tenant(s), shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.
- (c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.
- (d) Filion's, and his tenant(s)', use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.
- (e) A trashcan compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.
- (f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee.
- 26. <u>TITLES AND HEADINGS</u>: Titles and headings are inserted in this Agreement for reference purposes only, and shall not be used to interpret the Agreement.
- 27. **SEVERABILITY**: Each provision of this Agreement must be interpreted in a way that is valid under applicable law. In the event that any provision or portion of this Agreement is determined by a court of competent jurisdiction to be void, invalid, or otherwise unenforceable, such provision or portion shall be deemed reformed, insofar as is possible, to cure the defect and give maximum effect to the intent of the City and Filion, and his tenant(s), entering into this Agreement, and in any event the remainder of the Agreement shall continue in full force and effect.

28. ENTIRE UNDERSTANDING: This Agreement constitutes the entire understanding between or on behalf of the City and Filion, and his tenant(s), and supersedes any prior understandings and/or written or oral agreements between them or on their behalf respecting the subject matter herein. There are no representations, agreements, arrangements, or understandings, oral or written, between and among the parties hereto relating to the subject matter of this Agreement, which are not fully expressed herein.

This Agreement may be modified or amended only by a writing signed and dated by both parties. All amendments shall be incorporated and made a part of this Agreement, and attached hereto.

- 29. <u>SUCCESSORS AND ASSIGNS</u>: All rights hereunder shall inure to the benefit of and all obligations hereunder shall be binding upon successors, assigns, subsidiaries, subrogees, parents, agents, employees, attorneys, accounts, legal representatives, directors, shareholders, heirs, and executors or administrators of each of the parties to this Agreement.
- during which any term of this Agreement is in effect, Filion, and his tenant(s), do not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United States Code or the U.S. Attorney General.
- 31. **AUTHORITY TO EXECUTE:** The terms of this Agreement are contractual and not mere recital, and the individuals executing this Agreement hereby represent and warrant that they have full and complete authority to covenant and agree as herein provided and to execute this Agreement on behalf of the Parties hereto.

- 32. <u>AUTHORIZATION TO TRANSACT BUSINESS IN THE</u>

 <u>COMMONWEALTH:</u> Filion's tenant(s), hereby represent that it/they is/are organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership and is/are authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.
- 33. **COUNTERPARTS**: The Agreement may be signed in counterparts. The Parties hereto agree that facsimile or email signatures shall have the full force and effect of original signatures.

IN WITNESS WHEREOF, the parties hereto have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

(SIGNATURE PAGES FOLLOW)

CITY OF NORFOLK

	By:
	City Manager
Attest:	
City Clerk	
COMMONWEALTH OF VIRGINIA CITY OF NORFOLK, to-wit:	
I,	he day of, 20, do hereb ger, and R. Breckenridge Daughtrey, City Clerk mes as such are signed to the foregoing Encroachmen fore me in my City and State aforesaid.
Given under my hand this day of	, 2016.
	Notary Public
	Registration:
Approved as to Contents:	
Director of General Services	
Approved as to Form and Correctness	
Deputy City Attorney	

PAUL FILION	

COMMONWEALTH				
CITY OF		wit:		
the Commonwealth of	Virginia, do ent Agreement	hereby certify that Pau has acknowledged the	for the City of al Filion, whose name is a same before me in my d a driver's license as ide	City and State
Given under m	y hand this	day of	, 2016.	
		Notary Public		

Tenant Endorsement and Acceptance:

	Tenant:
	By:
COMMONWEALTH OF VIRGINIA CITY OF, to-wit:	
I,, a Notary the Commonwealth of Virginia, do he (title)	Public in and for the City of, in the creby certify that whose name is the ment, has acknowledged the same before me in my City and the course to me or has produced a driver's license at the course of the course
signed to the foregoing Encroachment Agree and State aforesaid. He/She is personally identification.	ment, has acknowledged the same before me in my City known to me or has produced a driver's license a
Given under my hand thisday o	of, 2016.
	Notary Public Registration:





